Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1999

Wynne L. Creekmore, Jr.,

Petitioner,

vs.

Vasa North Atlantic Insurance Company,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

Is it a denial of due process and/or equal protection of law for the courts of a State to apply the Equal Credit Opportunity Act in such a way as to deny the debtor a private action remedy under the Act involving business credit even though the creditor has failed to give the debtor notifications mandated by the Act which failure constitutes an actionable violation of the Act?

PARTIES TO THE PROCEEDING

The parties are limited to those named in the caption namely, Wynne L. Creekmore, Jr. and Vasa North Atlantic Insurance Company ("Vasa").

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OPINIONS BELOW

The judgment of the Supreme Court of the State of Texas ("Texas Supreme Court") denying petitioner's Petition for Review, Case No. 98-0684, is unpublished and without opinion, but can be found in the Texas Supreme Court's Orders Pronounced September 17, 1998. The Texas Supreme Court order overruling Petitioner's Motion for Rehearing of Petition for Review is unpublished and without opinion; it can be found in the Texas Supreme Court's Orders Pronounced December 17, 1999. The opinion in this case by the Court of Appeals for the First District of Texas, Houston, Texas ("Court of Appeals"), Case No. 01-96-01294-CV, issued April 9, 1998, is unpublished but can be found in the records of that court relating to this case. The judgment of the Court of Appeals in this appeal, dated April 9, 1998, is also unpublished, but can be found in the records of that court relating to this case as can the Court of Appeals order of May 18, 1998, overruling petitioner's motion for rehearing. The July 2, 1996, final judgment of the trial court granting summary judgment in Case No. 645,079, County Civil Court at Law No. One, Harris County, Texas, ("Trial Court") is not published, but can be found in the record of petitioner's appeal to the Court of Appeals, as will also be found the Trial Court's order of September 4, 1996, overruling petitioner's motion for new trial.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed under this petition was rendered by the Court of Appeals April 9, 1998, affirming the part of the Trial Court judgment concerning the ECOA claim which is the subject of this petition. The Texas Supreme Court, the State court of last resort in this case,

overruled petitioner's motion for rehearing of his Petition For Review on December 17, 1998.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

. . . CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C. §1691a of the Equal Credit Opportunity Act ("ECOA") containing definitions provides in relevant part:

> "(c) The term 'Board' refers to the Board of Governors of the Federal Reserve System.
>
> * * *
>
> "(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question."

15 U.S.C. §1691b of the ECOA provides in relevant part:

"(a)(1) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

* * *

"(5) The Board shall provide in regulations that an applicant for a business or commercial loan shall be provided a written notice of such applicant's right to receive a written statement of the reasons for the denial of such loan."

15 U.S.C. §1691e of the ECOA provides in relevant part:

"(a) Individual or class action for actual damages

> "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

"(b) Recovery of punitive damages in individual and class actions for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions;

factors determining amount of award

"Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

"(c) Action for equitable and declaratory relief

"Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

"(d) Recovery of costs and attorney fees

"In the case of any successful action under

> subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

"(f) Jurisdiction of courts; time for maintenance of action; exceptions

> "Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation . . . ."

12 C.F.R. §202.1 of Regulation B issued pursuant to the ECOA provides in relevant part:

> "(e) Applicant means any person who requests or who has received an extension of credit from a creditor . . . .
>
> * * *
>
> "(j) Credit means the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.
>
> * * *
>
> "(l) Creditor means a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit.

* * *

"(m) Credit transaction means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).

12 C.F.R. §202.9 of Regulation B provides in relevant part:

(a) Notification of action taken, ECOA notice, and statement of specific reasons ---

(1) When notification is required. A creditor shall notify an applicant of action taken within:

* * *

(iv) 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered.

* * *

(3) Notification to business credit applicants. For business credit, a creditor shall comply with the requirements of this paragraph in the following manner:

* * *

(i) . . . a creditor shall comply with paragraphs (a) (1) . . . .

STATEMENT OF THE CASE

A. Facts Material To Consideration Of The Questions Presented.

Vasa sued Creekmore, an attorney, in the Trial Court for breach of contract arising out of Creekmore's failure to repay a $9,823.08 extension of business credit representing insurance deductibles advanced by Vasa under Creekmore's professional liability insurance policies ("Credit Extension"). On or about February 8, 1994, before Vasa's suit was filed, Vasa had offered to refinance a part of the Credit Extension by means of a new promissory note to be executed by Creekmore in the amount of $3,000.00; Creekmore did not expressly accept Vasa's offer. Creekmore filed counterclaims against Vasa based upon the Equal Credit Opportunity Act, 15 U.S.C. §1691-1691f ("ECOA"), and tortious interference with contractual relations. The ECOA counterclaim was based upon the fact that Vasa failed to give Creekmore the notifications required by the ECOA after Creekmore did not accept the offer by Vasa to refinance a portion of the Credit Extension, [see 12 C.F.R. §202.9(a)(3)(i)].

On July 2, 1996, the Trial Court granted summary judgment in favor of Vasa on its claim, dismissing Creekmore's counterclaims; the ECOA counterclaim was dismissed even though Vasa offered no summary judgment evidence to support dismissal of the claim, basing its entire argument for dismissal of the ECOA claim on the statute of limitations ground described below.

Creekmore appealed the Trial Court's summary judgment to the Court of Appeals which issued an opinion on April 9, 1998, sustaining the Trial Court's dismissal of the ECOA claim and holding that there can be no violation of the ECOA unless a creditor has denied credit to an applicant, and that Vasa "never denied credit to Creekmore." (See Court of Appeals Opinion, page 3)

The Court of Appeals reversed the Trial Courts judgment dismissing Creekmore's counterclaim for tortious interference with contractual relations and remanded the case to the trial court for further proceedings limited to Creekmore's tort counterclaim.

Creekmore then filed a petition for review in the case with the Texas Supreme Court; the petition for review was denied without opinion on September 17, 1998, and the Texas Supreme Court also overruled Creekmore's motion for rehearing of the petition for review on December 17, 1998.

B. Federal Questions Raised In Proceedings Below.

1. In The Trial Court.

Creekmore first raised the federal question issue that Vasa had violated the ECOA in his Defendant's Original Counterclaim And Jury Demand filed November 1, 1995, in which he alleged that

> ". . . the actions of Counter-Defendant (Vasa) constitute the extension of credit upon which the appropriate disclosures required by Regulation B issued by the Federal Reserve Board have not been made to Counter-Plaintiff (Creekmore) and therefore Counter-Defendant has violated Regulation B and the

Federal Equal Credit Opportunity Act and is therefore liable for damages as provided in said Statute and Regulation.

* * *

"The conduct of Counter-Defendant described above constitutes one or more violations of the requirements of Regulation B, 12 CFR 202, issued by the Federal Reserve Board pursuant to Title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act, as amended, 15 USC Section 1601, etc., and Counter-Plaintiff is entitled to recover damages, equitable and declaratory relief, and attorneys fees as provided in said Act. In particular, without limitation, the actions of Counter-Defendant in its dealings with Counter-Plaintiff represented and represent one or more violations of the requirements of 12 CFR 202.9 specifying the requirements concerning notifications which are necessary to be made by a creditor in connection with business credit as described in said Regulation in that said Counter-Defendant failed to give Counter-Plaintiff the notices as required by that law."

On May 16, 1996, Vasa filed its First Amended Motion For Summary Judgment Of Plaintiff And Counter-Defendant Vasa North Atlantic Insurance Company in which it moved for summary judgment on Creekmore's ECOA claim, because the two-year statute of limitations under ECOA [see 15 U.S.C. §1691e(f)] had run out. Vasa's statute of limitations argument was based upon the proposition that the limitation period began running at the time of the issuance of the professional liability insurance policies all of which were issued more than two years before Creekmore filed his

ECOA counterclaim on November 1, 1995.

On June 27, 1996, Creekmore filed his Defendant's Response To Plaintiff's First Amended Motion For Summary Judgment and his Defendant's First Amended Original Counterclaim And Jury Demand; in both of these pleadings, Creekmore asserted that the ECOA claim was based upon an offer by Vasa to extend credit to Creekmore which offer was made on or about February 8, 1994, less than two years before Creekmore first filed his ECOA counterclaim on November 1, 1995.

On July 2, 1996, the Trial Court granted Plaintiff's First Amended Motion For Summary Judgment and signed a Final Judgment which dismissed Creekmore's ECOA counterclaim in the following language:

> "It is further, ORDERED, ADJUDGED and DECREED that all claims filed by Defendant/Counter-Plaintiff Wynne L. Creekmore, Jr.. d/b/a Wynne L. Creekmore, Jr., Attorney at Law, against plaintiff/Counter-Defendant Vasa North Atlantic Insurance Company are dismissed."

On August 1, 1996, Creekmore filed his Motion for New Trial in the case reasserting the justifications for his ECOA counterclaim which he had made in his Defendant's Response To Plaintiff's First Amended Motion For Summary Judgment; the Trial Court overruled Creekmore's Motion for New Trial by an order signed September 4, 1996.

2. In The Court Of Appeals For The First District Of Texas.

On May 30, 1997, Creekmore filed his Appellant's

Brief, in the appeal of this case, with the Court of Appeals Court of Appeals in which the federal question of the violation of the ECOA was raised in Point of Error One of the brief as follows:

> "The trial court committed reversible error by dismissing appellant's counterclaim against appellee for violation of the Federal Equal Credit Opportunity Act because the evidence showed there was at least an unresolved issue of fact, precluding summary judgment, that appellee had offered to extend credit to appellant within two years before appellant filed his counterclaim and that such offer of credit was not accepted and appellee had thereby violated the Equal Credit Opportunity Act and Regulation B by not making disclosures to appellant required by said statute and said regulation thus subjecting appellant to civil liability provided by said statute and regulation"

On April 9, 1998, the Court of Appeals issued its opinion in the case ruling that the facts did not permit Creekmore to bring a private action under ECOA; the court wrote:

> "In point of error one, Creekmore contends the trial erred in rendering summary judgment because there is a fact question regarding his Equal Credit Opportunity Act claim.
>
> * * *
>
> "Creekmore's Equal Credit Opportunity Act claim arises out of an installment promissory note VASA offered to Creekmore as a way to repay the $3,000 balance he owed on the first policy deductible.

> Creekmore claims VASA did not comply with the Act after Creekmore rejected the offer of the promissory note.
>
> "The elements of an Equal Credit Opportunity Act claim are: (1) the applicant is a member of the protected class; (2) the applicant in fact applied and was qualified for credit; and (3) the applicant was denied credit notwithstanding his qualifications. See generally *Moore v. United States Dep't of Agric. ex rel. Farmers Home Admin.*, 55 F.3d 991,993 (5th Cir. 1995). VASA, however, never denied credit to Creekmore. Creekmore judicially admits in his first amended counterclaim that he did not accept VASA's offer of credit, not vice-versa. Accordingly, the trial court did nor err in dismissing Creekmore's Equal Credit Opportunity Act claim.
>
> "We overrule point of error one."

On April 24, 1998, Creekmore filed his Appellant's Motion For Rehearing in the Court of Appeals. In the motion for rehearing, Creekmore argued that the Court of Appeals was mistaken in its reliance on *Moore v. United States Dep't of Agric. ex rel. Farmers Home Admin.*, supra, as authority for what the Court of Appeals had held to be the elements of an ECOA cause of action. Creekmore's Motion For Rehearing stated in part:

> "The federal circuit court in the *Moore* case did not approve the elements which are described above, it merely recited that the district court had held those were the elements, 55 F.3d 991, at 993. The district court in *Moore* held that the ECOA claimants failed to make out a prima facie case of discrimination (did not

satisfy all the district court's elements), 55 F.3d 991, at 993; however, because the opposing party had conceded there was an ECOA violation, the 5th Circuit vacated the district court ruling and rendered judgment for the Moore's on their ECOA claim, 55 F.3d 991, 996."

On May 18, 1998, the Court of Appeals overruled Creekmore's Motion For Rehearing without opinion.

3. In The Supreme Court Of The State Of Texas.

On July 15, 1998, Creekmore filed his Petition For Review with the Texas Supreme Court. In the Petition For Review summarized his ECOA argument as follows:

"The Court of Appeals misconstrued the federal Equal Credit Opportunity Act and its implementing regulation, Regulation B, and applied an incorrect definition of the elements of a cause of action under that Act; the Court of Appeals opinion substantially restricts the scope of the Equal Credit opportunity Act and Regulation B from the plain meaning of that legislation."

On September 17, 1998, the Texas Supreme Court, without opinion, denied Creekmore's Petition For Review.

On or about October 30, 1998, Creekmore filed with the Texas Supreme Court his Motion For Rehearing From The Denial Of Petition For Review which reasserted his right of private action under the ECOA in the following Issue Presented:

"**Issue No. 1**: The facts of this case entitle Petitioner

> to invoke the provisions of the Federal Equal Credit Opportunity Act which it is the duty of the State courts to uphold; the rulings in this case by the trial court and the court of appeals deprive Petitioner of his remedy under the statute and the equal protection of that law."

On December 17, 1998, the Texas Supreme Court, without opinion, overruled Creekmore's Motion For Rehearing From The Denial Of Petition For Review.

REASONS FOR GRANTING THE WRIT

In this case Creekmore sought to assert a private action under the ECOA under the civil liability provisions of the Act. See 15 U.S.C. §1691e. In the Trial Court the claim was dismissed in a summary judgment proceeding apparently on the basis that the two-year statute of limitations had run on Creekmore's claim. See 15 U.S.C. §1691e(f). The statute of limitations argument was the only legal argument offered at the Trial Court level as a basis for dismissing the claim even though the event on which the claim was based was not two years-old when Creekmore filed the claim.

In its opinion, the Court of Appeals did not mention the issue of the statute of limitations in connection with the ECOA claim, but based its affirmance of the Trial Court's dismissal on a finding that the elements of an ECOA claim were those that were attributed to *Moore v. United States Dep't of Agric. ex rel. Farmers Home Admin*, supra. Yet, the Fifth Circuit Court of Appeals in *Moore* did not hold that the elements of an ECOA claim were what the Court of Appeals held them to be.

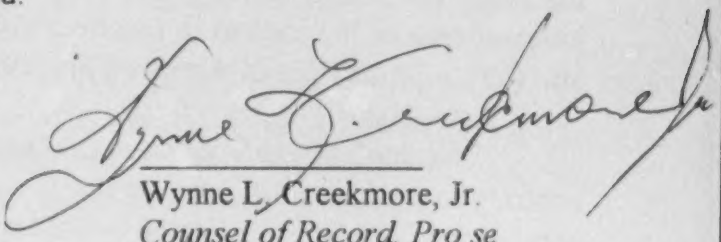
Upon consideration of Creekmore's Petition For

Review, the Texas Supreme Court "denied" it, which means that ". . . the [Texas] Supreme Court is not satisfied that the opinion of the court has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction." rule 56.1(b)(1), Texas rules of Appellate Procedure.

The result of the State court proceedings in this case is contrary to the intentions expressed by Congress when it enacted the ECOA. As indicated by the legislative history of the Act, Pub. L. 94-239, 1976 U.S. Code Cong. and Adm. News, p. 403, 413-415, Congress intended for the ECOA to apply to business credit in order to accomplish the anti-discrimination purposes of the Act. Further, Congress considered the chief enforcement tool of ECOA to be private actions. Any inclination by State courts to restrict the scope of ECOA from what is indicated by the plain meaning of the Act and Regulation B would operate to defeat the purpose of ECOA.

CONCLUSION

For the reasons stated above in this Petition, Creekmore respectfully requests that his petition for Writ of Certiorari be granted.



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